possessed marihuana in the United States. This indicated a far stronger probability of knowledge of the foreign origin of the drug than in the instant case, where petitioner remained in the United States during the alleged offenses. Here, the jury could have found that petitioner had knowledge of the transportation and concealment of marihuana without knowing that it had been unlawfully imported. A finding that petitioner had constructive possession of marihuana due to his supplying of money and a car for transporting the drug does not necessarily indicate knowledge, or a strong probability of knowledge, of the origin of that drug. The decision of the Ninth Circuit, finding harmless error beyond a reasonable doubt despite the substantial possibility of reliance on the presumption, conflicts with the Fifth Circuit's position, which demands a greater amount of certainty that the error is harmless. This conflict calls for re-evaluation of the denial of certiorari.

II

Concentration Of Cases Under The Invalid Presumption Of 21 U.S.C.A. § 176a In The Ninth Circuit Makes Further Conflict Between Circuits Improbable; This Petition Should Therefore Be Granted.

Independent of the above conflict between the Fifth and Ninth Circuits, it is appropriate for this Court to reconsider its denial of certiorari due to the overwhelming predominance of cases arising under 21 U.S.C.A. § 176a within the Ninth Circuit.

General language in different circuits as to what

constitutes harmless error beyond a reasonable doubt is difficult to use to illustrate conflict within the circuits on this point. It is necessary to compare the factual situation in which Courts of Appeals decide whether errors are harmless beyond a reasonable doubt. Because of the concentration of cases arising under 21 U.S.C.A. § 176a in the Ninth Circuit, it is improbable that future conflict among the circuits will erupt on determinations of harmless error of the presumption in the context of 21 U.S.C.A. § 176a. By petitioner's count, forty-five of the sixty cases in Circuit Courts of Appeals construing 21 U.S.C.A. § 176a in 1970 were contested in the Ninth Circuit, twelve in the Fifth Circuit, and three in the remaining circuits. Concentration of types of cases within a circuit, with the resulting improbability of conflict among the circuits, has been recognized by this Court as a ground justifying a grant of certiorari on rehearing. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (1938).

CONCLUSION

In light of the conflict between the Fifth and Ninth Circuits, admittedly one of degree, and the predominance of cases under 21 U.S.C.A. § 176a in the Ninth Circuit, it is not only appropriate but imperative that this Court reconsider its denial of certiorari. This is particularly important since this petition involves a jury verdict arising out of, and possibly related to, circumstances encompassing unconstitutional error.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioner certifies that this Petition for Rehearing is presented in good faith and not for the purpose of delay; that said Petition is restricted to grounds involving intervening circumstances of substantial or controlling effect and more particularly other substantial grounds not previously presented, to wit, conflict in the circuits and concentration of cases in the 9th Circuit.

DATED: December 8, 1970.

BURTON MARKS

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned; say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on DECEMBER 9th, 1970, I served the within PETITION FOR REHEARING (NO 596) on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
SAN DIEGO, CALIFORNIA 92101

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DECEMBER 9th, 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer